A Conspiracy to Commit Genocide: Anti-Fertility Research in Apartheid's Chemical and Biological Weapons Programme

Abstract

In late 2013, Health Professions Council of South Africa found Dr. Wouter Basson guilty of unprofessional conduct. The charges stemmed from Basson's time as head of apartheid South Africa's chemical and biological weapons programme – a programme implicated in kidnappings, poisonings, and murders. Very little attention has been paid to a different aspect of the programme – anti-fertility research. This article argues that testimony from the Truth and Reconciliation Commission founds a reasonable basis to believe that scientists at the programme and their principals were engaged in a conspiracy to commit genocide – a conspiracy to surreptitiously deliver anti-fertility drugs to black South Africans with the intention of curtailing birth rates. A conspiracy of this kind gives rise to individual criminal responsibility in international criminal law and, given South Africa's approach to the incorporation of international crimes, may be prosecuted as such in a domestic court. Regardless of whether it would be a good idea to prosecute the conspirators now, 30 years after the fact, South Africa's research into anti-fertility drugs ought to play a far greater role in contemporary discussions of apartheid-era wrongs.

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1. Introduction

In late 2013, the Health Professions Council of South Africa (HPCSA) found Dr. Wouter Basson guilty of unprofessional conduct, as defined in Section 1 of the Health Professions Act of 1974.[1] Basson, or Dr. Death as he is often termed in the press, was the head of apartheid South Africa's chemical and biological weapons programme – a programme implicated in numerous kidnappings, poisonings, and killings in the 1980s. Although the hearing before the HPCSA was confined to professional ethics, and despite the ongoing delays in the imposition of a professional sanction consequent on the finding of guilt, it seems likely that almost three decades after most of the acts, there will be some, albeit minor, form of punishment for Basson.

The HPCSA hearing, just like most academic and popular discussion, focused on two aspects of the chemical and biological weapons programme: the development of toxins for targeting opposition activists and the production of street drugs such as mandrax and ecstasy. One aspect of the programme has received comparatively less attention: research into fertility.

This article focuses on the fertility project. Its central argument is that testimony from South Africa's Truth and Reconciliation Commission founds a reasonable basis to believe that researchers at the chemical and biological weapons programme, together with their principals, were engaged in a conspiracy to commit genocide under international law. After a brief history in Section 2, Section 3 sets out the evidentiary basis of the claim. Thereafter, Section 4 analyzes the basis and content of the crime of conspiracy to commit genocide under international law, with the conclusion that there is a reasonable basis to believe that the crime was committed.

[1] Health Professions Council of South Africa, Professional Conduct Committee: Concerning Dr. Wouter Basson

Section 5 assesses the lawfulness of a domestic prosecution in South Africa. Even if such a prosecution is unlikely to go ahead, the programme's research into anti-fertility drugs ought to play a greater role in discussions about apartheid-era wrongs.

2. Background

South Africa's chemical and biological weapons programme, codenamed Project Coast, was established in 1981 by Magnus Malan, the Minister of Defence.[2] Project Coast brought together research scientists, doctors, veterinarians, and other health professionals under a management committee that included high-ranking members of the South African Defence Force.[3] The project officer was Dr. Wouter Basson.

Much of what we know about Project Coast comes from testimony before South Africa's Truth and Reconciliation Commission (TRC). The TRC, established in 1995, was charged with investigating and documenting gross human rights abuses committed in the period 1960-1994, facilitating the granting of amnesty to perpetrators of political violence who made full disclosure, and making known the fate or whereabouts of victims.[4] In addition to its general work, the TRC conducted a number of special investigations, including one into the chemical and biological weapons programme, with hearings held in June and July of 1998. A number of central participants, including Basson himself, appeared at the special hearings.

Far from being simply a research programme aimed at defensive measures, Project Coast was shown by the TRC investigation to be intimately connected to the apartheid state's persecution of its enemies.[5] A central plank of the research work was devoted to the development of toxins for poisonings to be carried out by operatives from the Civil Co-operation Bureau, a state-sponsored death-squad.[6] The TRC Report talks of 'anthrax in cigarettes, botulinum in milk, and paraoxon in whiskey.'[7]

Testimony at the hearings also established the programme's involvement in the production of street drugs, including mandrax and ecstasy, the use of front companies to conceal its activities, and widespread fraud and financial mismanagement.[8] The exposure of Project Coast, with its

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[2] C. Gould and P. Folb, *Project Coast: Apartheid's Chemical and Biological Weapons Programme* (Geneva: UNIDIR, 2002), at 44.
[3] *Ibid*., at 31-45.
[4] Section 3 Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa).
[5] See Truth and Reconciliation Commission of South Africa Report, Volume 2 (29 October 1998), at 510-521. Transcripts of the Chemical and Biological Weapons Hearings are available at http://www.justice.gov.za/trc/special/.
[6] See Gould and Folb, *supra* note 2, at 160-167 for a detailed list of incidents. See also Testimony of Schalk van Rensburg, Chemical and Biological Weapons Hearings of the Truth and Reconciliation Commission of South Africa (9 June 1998): 'The most frequent instruction we obtained from Doctor Basson and Doctor Swanepoel was to develop something with which you could kill an individual which would make his death resemble a natural death and that something was to be not detectable in a normal forensic laboratory. That was the chief aim of Roodeplaat Research Laboratories covert side.'
[7] TRC Report, *supra* note 5, at 514.
[8] *Ibid*.

scientists and toxins, its experiments and expense, garnered a great deal of local and international attention.[9]

In addition to their work on toxins and street drugs, scientists at Project Coast were deeply engaged in anti-fertility research. The goal of the research was to produce a vaccine that could be surreptitiously given to black South Africans. It is this research that founds the argument for international criminal responsibility.

3. Anti-Fertility Research at Project Coast and its Aftermath

A. Testimony at the TRC

Project Coast's biological research was carried out at Roodeplaat Research Laboratories (RRL), a front company with a facility just north of Pretoria. At the TRC, two of Project Coast's leading scientists — Dr. Daan Goosen and Dr. Schalk van Rensburg — testified about the anti-fertility work carried out at RRL. Goosen, a veterinarian by training and medical researcher, set up RRL in 1983 after being approached by Basson. Van Rensburg, also a veterinarian and medical researcher, joined RRL in August 1984 as its third director.

Van Rensburg testified that he was approached by Basson in 1985 to work on a fertility project. Initially, the project was pitched as a request from Jonas Savimbi, leader of the National Union for the Total Independence of Angola (UNITA) in the Angolan Civil War.[10] Savimbi was said to be concerned that many of his best fighters were falling pregnant; RRL was to carry out research into fertility control to assist UNITA. Of course, the scientists did not believe the cover story — Van Rensburg testified that he 'could not think that an intelligent man could think we could spend a couple of million on a project like this to control pregnancy in a few of Savimbi's female soldiers…'[11] Nonetheless, the project got under way and became central to the work at RRL.[12]

The true nature of Project Coast's anti-fertility research became clear at the TRC's special hearings. Under questioning from Jerome Chaskalson, a TRC investigator, Goosen provided detail of the workings of the project:

> Mr. Chaskalson: So it was decided that a front company would be formed. Can you tell us what the brief that you were given for this front company was?
> Dr. Goosen: … [O]ur final brief, or the other brief was, [a] very, very important one, was to develop a product to curtail the birth rate of the black population in the country…
> Mr. Chaskalson: Could you tell us a little bit more about this? Who asked you to develop this product?
> Dr. Goosen: The person who directly instructed us or asked us to do this was Dr. Basson. Now there was a lot of talk about the ethics of this, that and the other and the rest, and he spent some time quoting to us the [census] figures of 1982 or '81 or whenever the census was, I can't remember exactly, that the census office stopped counting the black people

[9] See e.g. M. Burger, 'Basson Trial to Reveal Dark CCB Secrets' *Sunday Independent*, 29 April 2000; W. Finnegan, 'The Poison Keeper' *The New Yorker*, 15 January 2001, at 58.
[10] UNITA received support from South Africa during the Angolan Civil War.
[11] Testimony of Schalk van Rensburg, *supra* note 6.
[12] Testimony of Schalk van Rensburg, *supra* note 6; Testimony of Daan Goosen, Chemical and Biological Weapons Hearings of the Truth and Reconciliation Commission of South Africa (11 June 1998).

> when they reached 45 million. And the government decided that it is not feasible to make known to the public that there was 45 million blacks. It was just too many. And this was mainly one of our big threats. I think the figure of about 28 million was made known. Now if those were true facts I wouldn't know. Up till today I don't know. But that was presented to us by Dr Basson.
> …
> And by the way Mr Chairman this project was known, personally I know, up to the level of the Surgeon-General, because the Surgeon-General visited us, both General Nieuwoudt and General Knobel taking over for it. When General Nieuwoudt was leaving the service, retiring, he visited us on a Saturday morning and when walking out of it, and we have explained all these projects to them, we had project meetings in fact, explained it to them, this anti-fertility project and the progress and the possibilities etc, and when they walked out he said, Nieuwoudt in the presence of General Knobel, this is the most important project for the country. That is the truth.[13]

Later, under questioning from Dr. Fazel Randera, a TRC Commissioner, Goosen provided further specifics about the fertility project:

> Dr. Randera: … are we talking fertility control here or are we talking sterility control when you were considering the various research that was being done? Were we looking at a temporary thing, the pill or the injection that I know very commonly or were we talking about sterilising people on a long-term basis, permanently?
> Dr. Goosen: Mr. Chairman, one thing which I can remember which we spoke about was the effectivity then of the product which needed to be developed, whether it is a 100% permanent sterilisation or whether it is a temporary or whether it is 80% effective, you know how these things work.
> We in fact discussed involving statisticians from the university and we discussed getting them secret clearance so that they can work on the project for us, to work out models, what will be the influence on the population growth rate if the product was 50% effective for one year, 60, 70, whatever. I think this answers your question. So we realised that you cannot really, you might not achieve a 100% effective sterilisation and it was not thought to be necessary.

The testimony of Schalk Van Rensburg, also a director of RRL, confirms that underlying Project Coast's fertility research was the idea of creating a vaccine to cause infertility in black South Africans:[14]

> Adv. Potgieter: … So the product itself, it can never be ethnic specific but you can apply it - to target a particular group of people.
> Dr. Van Rensburg: You can apply it to whoever group you target, right.
> Adv. Potgieter: Now were you suspecting that that was one of the underlying intentions?
> Dr. Van Rensburg: Absolutely. One would expect anything from previous experience and what these people do.

[13] Testimony of Daan Goosen, *supra* note 12.
[14] Testimony of Schalk van Rensburg, *supra* note 6.

Adv. Potgieter: And the idea was to, was it a vaccine that would diminish ... (intervention)
Dr. Van Rensburg: That would be a vaccine. There are various approaches, you can either make the male sterile, which is actually easier, you get sperm specific antigens and in fact these things happen spontaneously in certain individuals and they go very sterile, now that is if sperm leaked into the tissue and there was an immunological reaction for instance because there are certain proteins and immunogens which are specific, you only get them in sperm.
Dr Borman was more keen on this approach, I was a little bit more keen, although we worked on both approaches, to get a female vaccine and you target a protein compound, or a hormone-like compound, it's only produced by the embryo and usually in the placenta. There's unique proteins there and if you have antibodies against that the little developing embryo cannot implant and it's expelled when it's still too small to see.
…
Adv. Potgieter: What I wanted to hear was, was it supposed to be a covert kind of thing, not a vaccine that you sort of apply to people quite openly?
Dr. Van Rensburg: It was generally considered very much covert and it would be for instance too politically sensitive at that time for the government to go to the Medical Research Council and say here's R5 million a year, we want you to do this project, at that time it would have been far too politically sensitive for the Medical Research Council to be involved in something like that.

B. The End of Project Coast and Trial of Basson

South Africa's chemical and biological weapons programme was shut down in the early days of democracy, a process that included ratification of the Chemical Weapons Convention in September 1995.[15] Of the main participants in Project Coast, only Jan Lourens received amnesty from the TRC.[16] Some of the state operatives who used Project Coast's toxins to poison anti-apartheid activists testified at the TRC; many did not. As has been the case more broadly with apartheid-era crimes for which no amnesty was granted, the National Prosecuting Authority of South Africa has generally not pursued prosecutions.[17]

The central figure in Project Coast — Wouter Basson — was prosecuted in 1999. Basson was charged with 67 counts, including murder, attempted murder, conspiracy to commit murder, fraud, and drug possession.[18] Many of these charges related to his work at Project Coast. Early on, conspiracy charges relating to the mass murder of individuals outside of South Africa were dismissed on the grounds that the relevant statute did not criminalize conspiracies entered into

[15] For a full account, see Gould and Folb, *supra* note 2, at 209-222.
[16] See Truth and Reconciliation Commission Amnesty Committee, Jan Lourens, AM6490/97 (Decision of 17 May 2001).
[17] See generally *Nkadimeng and others v. National Director of Public Prosecutions and Others* (High Court of South Africa) [2008] ZAGPHC 422 (12 December 2008); O. Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Brill, 2009).
[18] *S v. Basson* (High Court of South Africa) [2000] 1 All SA 430 (T) (12 October 1999).

within South Africa to commit crimes beyond its borders.[19] Subsequently, after a marathon trial, Basson was acquitted of all charges.[20]

This is not the place for a full examination of the acquittal or the conduct of the presiding judge – Judge Hartzenberg – during the trial.[21] It is worth noting that the Constitutional Court overturned the dismissal of the conspiracy charges in 2005, opening the door for a retrial on those counts, and that none of the charges related to the anti-fertility research at Project Coast.[22] Nonetheless, later that year the National Prosecuting Authority announced that Basson would not be retried; this was the end of the road for the criminal processes against Basson in South Africa.[23] Dr. Death emerged unscathed, and returned to practice as a cardiologist.

4. Conspiracy to Commit Genocide in International Law

A. Introduction

That Basson escaped conviction does not put him in a class of his own. Many crimes, both domestic and international, were perpetrated during apartheid; many alleged perpetrators were refused amnesty or did not even apply for it. Prosecutions since the end of the TRC have been negligible. There is a great deal of unfinished business in addressing apartheid-era wrongs.

This article, however, focuses only on Project Coast's anti-fertility research and argues that there is a reasonable basis to believe that the international crime of conspiracy to commit genocide was committed. Focus on the anti-fertility research is important for three reasons. First, the apartheid state's research into fertility is barely part of the ongoing academic and popular discussion of its wrongs. However the unfinished business of the TRC is resolved over the coming decade, Project Coast's search for a fertility vaccine ought to be part of the conversation. Second, the scale of intended crime demands attention. In legal terms, even if genocide does not sit at the top of a hierarchy of international crimes, its immense gravity and status as a *jus cogens* norm are beyond dispute.[24] In human terms, the conspiracy sought to interfere coercively with a most intimate element of individual autonomy – procreative freedom.[25] Third, and finally, it is worth examining Project Coast's anti-fertility research because, in a way, it represented the end-point of the intellectual and moral bankruptcy of apartheid. The core elements of the apartheid project – the uninhibited power of the state, systemic racial discrimination, reliance on

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[19] Ibid.
[20] *S v. Basson* (High Court of South Africa) (11 April 2002), unreported.
[21] For a journalistic account, see Finnegan, *supra* note 9.
[22] *S v. Basson* (Constitutional Court of South Africa) [2005] ZACC 10 (10 March 2004).
[23] S. Adams, '"Relieved" Basson eager to make a fresh start' *IOL*, 20 October 2005.
[24] On the status of genocide as a *jus cogens* norm, see *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, International Court of Justice, 3 February 2006, ICJ Reports (2006) 6, § 64. On the idea of a hierarchy of international crimes, see generally Sentencing Judgment, *Tadić* (IT-94-1-A and IT-94-1-A*bis*), Appeals Chamber, 26 January 2000, § 69; Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 36; A. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' 87 *Virginia Law Review* (2001) 415; M. Frulli, 'Are Crimes against Humanity More Serious than War Crimes' 12 *European Journal of International Law* (2001) 329; S. D'Ascoli, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Oxford: Hart, 2011), at 303-307.
[25] Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (New York: Knopf, 1993), at 166-167.

bureaucratic evil, and a founding assumption that individual lives are simply objects of power – culminate in a conspiracy to coercively sterilize an enormous number of black South Africans.

The evidentiary standard applied herein – a reasonable basis for believing that the crime was committed – is borrowed from international criminal practice; it is one that plays a critical role in informing the decision of the Prosecutor of the International Criminal Court (ICC) to initiate an investigation under Article 53 of the Rome Statute.[26] Although the jurisprudence of the ICC on Article 53 is not a model of clarity,[27] for present purposes one can refer to the holdings of the Pre-Trial Chambers in the *Kenya* and *Côte d'Ivoire* situations that a reasonable basis for belief requires neither comprehensive nor conclusive evidence, but rather that there exists a 'sensible or reasonable justification for a belief that a crime' has been committed.[28] A similar, if not identical, standard may be drawn from the *Zimbabwe Torture* case in South Africa as that conditioning the South Africa Police Service's duty to investigate crime.[29]

B. Conspiracy in International Criminal Law

Conspiracy as an inchoate crime in international law has a long and controversial history.[30] Article 6 of the Nuremberg Charter explicitly referred to the responsibility of participants in a conspiracy to commit the substantive crimes under the jurisdiction of the International Military Tribunal (IMT).[31] However, the Judgment of the IMT interpreted the provision restrictively, disregarding conspiracy charges with respect to war crimes and crimes against humanity and applying it only to crimes against peace.[32]

More recently, a great deal of attention has focused on whether participation in a conspiracy to commit war crimes gives rise to international criminal responsibility. The roots of the issue lie in the attempt of the United States to prosecute detainees at Guantanamo Bay. Under US law, the

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[26] See Art. 53(1)(a) Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90. It should be noted that under Article 53(1), the Prosecutor is under an obligation to also consider admissibility and whether there are substantial reasons to believe that an investigation would not serve the interests of justice.

[27] M. Ventura, 'The "Reasonable Basis to Proceed" Threshold in the Kenya and Côte d'Ivoire Proprio Motu Investigation Decisions: The International Criminal Court's Lowest Evidentiary Standard?' (12) *The Law and Practice of International Courts and Tribunals* (2013) 49.

[28] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01-09), Pre-Trial Chamber II, 31 March 2010, §§ 27, 35; Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire*, Situation in the Republic of Côte d'Ivoire* (ICC-01-09), Pre-Trial Chamber III, 3 October 2011, § 24.

[29] On the duty to investigate crime generally, see *Glenister v. President of the Republic of South Africa and Others* (Constitutional Court of South Africa) [2011] ZACC 6 (17 March 2011), § 176. In the *Zimbabwe Torture* case, the North Gauteng High Court applied a threshold of a 'reasonable basis' to trigger the duty of the police to investigate under South Africa's ICC Act - see *Southern African Litigation Centre and Another v. National Director of Public Prosecutions and Others* (High Court of South Africa) [2012] ZAGPPHC 61 (8 May 2012), § 31. Although the factual threshold was not explicitly at issue on appeal, the Constitutional Court's judgment can be read to confirm that position – see *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another* (Constitutional Court of South Africa) [2014] ZACC 30 (30 October 2014), § 78.

[30] See generally J. Okoth, *The Crime of Conspiracy in International Criminal Law* (The Hague: TMC Asser, 2014).

[31] Art. 6 Charter of the International Military Tribunal (Nuremberg) annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (signed in London, 8 August 1945) 82 UNTS 27.

[32] Judgment of the Nuremberg International Military Tribunal (1 October 1946) 41 *American Journal of International Law* (1947), at 172.

jurisdiction of military tribunals extended only to prosecutions of violations of the law of war. In *Hamdan*, the government sought to prosecute the accused for conspiracy to commit such crimes. One question was thus whether conspiracy was an offence under the laws of war. In the Supreme Court, a plurality of justices answered in the negative – the laws of war do not recognize conspiracy as a war crime.[33] There is little doubt that this holding is correct – international criminal responsibility for conspiracy to commit violations of the laws of war is found in neither treaty nor customary international law.[34]

There is no doubt, however, that international law prohibits conspiracy to commit genocide.[35] In treaty law, the Genocide Convention, to which 146 states are currently party, explicitly enumerates conspiracy to commit genocide as a punishable act. The language of Article 1 of the Convention – 'The Contracting Parties *confirm* that genocide … is a crime under international law…' – is indicative of custom; this should be seen to extend to other punishable acts explicitly enumerated therein.[36] As to the obligations of states, the ICJ has held that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.'[37] As to the obligations of individuals, in 1993, the Report of the UN Secretary-General to the Security Council on the establishment of the ICTY confirmed that the provisions of the Genocide Convention are part of customary international law.[38] Although some scholars disagree,[39] the weight of authority suggests that conspiracy to commit genocide is criminalized under customary international law.[40]

The inclusion of international criminal responsibility for conspiracy to commit genocide in the statutes of the *ad hoc* tribunals has led to a number of prosecutions, which, together with academic commentary and domestic criminal practice, have fleshed out the elements of conspiracy in international law. The following section will argue that there is a reasonable basis to believe that Project Coast's anti-fertility research constituted a conspiracy to commit genocide.

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[33] *Hamdan v. Rumsfeld* (United States Supreme Court) 548 U.S. 557. See more recently *Al Bahlul v. United States of America* (United States Court of Appeals for the District of Columbia), USCA Case #11-1234 (12 June 2015).
[34] See *Amicus Curiae* Brief of Specialists in Conspiracy and International Law in Support of Petitioner filed in *Hamdan v. Rumsfeld* (United States Supreme Court) 548 U.S. 557; G. Werle and F. Jessberger*, Principles of International Criminal Law* (3rd edn., Oxford: OUP, 2014), at 262.
[35] In respect of the prohibition of conspiracy to commit other international crimes, see Art. 3(a) International Convention on the Suppression and Punishment of the Crime of Apartheid (entered into force, 18 July 1976) 1015 UNTS 243.
[36] Art. 1 Convention on the Prevention and Punishment of the Crime of Genocide Convention (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (emphasis added).
[37] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, International Court of Justice, 28 May 1951, ICJ Reports (1951) 15, at 23. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, 26 February 2007, ICJ Reports (2007) 43.
[38] Report of the United Nations Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704 (3 May 1993), at § 45.
[39] See J. Ohlin, 'Conspiracy and Incitement to Commit Genocide' in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: OUP, 2009), at 222-224.
[40] See e.g. A. Cassese, 'Jurisdiction ratione materiae—Genocide', in A. Cassese, P. Gaeta, and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 335, at 347; Werle and Jessburger, *supra* note 34, at 262; B. Swart, 'Modes of International Criminal Liability' in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009); Okoth, *supra* note 30, at 152.

C. Conspiracy to Commit Genocide: Article 2(d) of the Genocide Convention

The Genocide Convention envisages a system of international cooperation to prevent genocide combined with a domestic regime of prosecution. Article 2 defines genocide in the following terms:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

In addition to genocide itself, Article 3 provides that conspiracy, direct and public incitement, attempts, and complicity are also punishable. Conspiracy is an inchoate crime — there is no requirement that the genocide occurs.[41] The inchoate nature of conspiracy is important for responsibility in respect of Project Coast as there is no evidence that the object of the conspiracy was completed.

The material element for conspiracy to commit genocide is the act of entering into an agreement with at least one other person to commit the crime of genocide.[42] It is this plan for concerted action that underpins conspiracy prosecutions. The mental element is the same as it is for genocide itself (*dolus specialis)*.[43] These elements may be drawn out in the following way.

1. Material Element

The first requirement is the existence of a conspiracy – an agreement to commit the crime. The agreement need not be formal or express; it 'may be inferred from the conduct of the conspirators or the concerted or coordinated action of a group of individuals...'[44] This coordination can take place in an institutional context, either among those in a single institution or those who control the actions of different institutions.[45]

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[41] See Judgment, *Gatete* (ICTR-00-61-A), Appeals Chamber, 9 October 2012, § 262; Judgment, *Tolimir* (IT-05-88-A), Appeals Chamber, 8 April 2015, § 582. In addition, recent case law confirms that where the object of a conspiracy to commit genocide is carried out, the participants may be convicted of both conspiracy and genocide as distinct offences. See *Gatete*, § 262; Judgment, *Popović* (IT-05-88-A), Appeals Chamber, 30 January 2015, § 538.
[42] Judgment, *Ntagerura* (ICTR-99-46-A), Appeals Chamber, 7 July 2006, § 92; Judgment, *Nahimana* (ICTR-99-51-A), Appeals Chamber, 28 November 2007, § 894; *Popović*, *supra* note 41, § 544.
[43] *Nahimana,* Appeals Chamber, *supra* note 42, § 894; *Tolimir*, *supra* note 41, § 582.
[44] *Tolimir*, *supra* note 41, § 583. See also *Popović*, *supra* note 41, § 544; *Nahimana*, Appeals Chamber, *supra* note 42, § 896.
[45] Judgment, *Nahimana* (ICTR-99-51-A), Trial Chamber, 3 December 2003, § 1048. See also *Nahimana*, Appeals Chamber, *supra* note 42, § 896-897.

At Project Coast, scientists were engaged in preparatory work that was necessary for an act of genocide to take place — the development of a fertility vaccine. Explicit reference to preparatory acts of this kind was excluded from the text of the Convention on the understanding that such acts 'would necessarily be incorporated within the crime of conspiracy to commit genocide.'[46] Moreover, as discussed in more detail below, it was understood that this vaccine was being developed to limit the fertility of black South Africans. Like separation of the sexes, prohibition on marriage, and sexual mutilation, the imposition of a fertility vaccine of this kind, without consent, clearly constitutes an act of genocide under Article 2(d) of the Genocide Convention.[47] That the measures were to be imposed without consent may be seen in testimony before the TRC that the vaccine might be delivered by telling the victims that 'you're giving them a vaccine for yellow fever or whatever…'[48] or by putting it in 'beer or in the maize…'.[49]

As to the nature and extent of the conspiracy, four points are relevant at this stage. First, it is not necessarily the case that every scientist or researcher engaged in anti-fertility research was party to the conspiracy. However, all those who at least tacitly agreed to participate are potentially implicated.[50]

Second, each conspirator need not have explicitly communicated with every other conspirator, or even been aware of their identities.[51] The conspiracy potentially reaches from the scientists to their political principals, including those who sanctioned the project and authorized its funding.

Third, it does not matter that the exact details of the delivery of the vaccine were still to be determined — Goosen testified that 'the mechanism to get to it, to the people, was the last thing you would research.'[52] In the common law, from which international criminal law of conspiracy draws, the specifics of the criminal scheme can be determined at a later date; agreement as to the overall purpose is sufficient.[53]

Fourth, case law from the *ad hoc* tribunals confirms that conspiracy to commit genocide is a continuing crime.[54] This is consistent with the common law position.[55] What this means in practical terms is that those who joined the fertility project after its inception, or made decisions

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[46] Judgment, *Bizimungu et al*. (ICTR-99-50-T), Trial Chamber, 30 September 2011, § 1960. See also the discussion reprinted in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden: Martinus Nijhoff, 2008), at 910-914.
[47] Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 507. See also Art. 1(2)(2) Genocide Convention, Secretariat Draft, UN Doc. E/447. It should be noted that there is yet to be an international criminal prosecution for genocide on the basis of imposing measures intended to prevent births. See though *Eichmann* (District Court of Jerusalem) No. 40/61 (11 December 1961) where the defendant was convicted of, *inter alia*, crimes against the Jewish People on the basis that he took measures calculated to prevent births among Jews.
[48] Testimony of Schalk van Rensburg, *supra* note 6.
[49] Testimony of Daan Goosen, *supra* note 12.
[50] *Nahimana*, Appeals Chamber, *supra* note 42, § 898. See also the phrasing of the Trial Chamber in *Nahimana*, Trial Chamber, *supra* note 45, § 1045: 'A tacit understanding of criminal purpose is sufficient.'
[51] P. Gillies, *The Law of Criminal Conspiracy* (Sydney: The Federation Press, 1990), at 18.
[52] Testimony of Daan Goosen, *supra* note 12.
[53] Gillies, *supra* note 51, at 36.
[54] *Nahimana*, Trial Chamber, *supra* note 45, § 1044; *Judgment*, *Popović* (IT-05-88-T), Trial Chamber, 10 June 2010, § 876. The Appeals Chamber has not addressed the status of conspiracy to commit genocide as a continuing crime.
[55] Gillies, *supra* note 51, at 36-37. See e.g. *DPP v. Doot* (House of Lords) [1973] AC 807.

as to its continued funding, are considered part of the conspiracy as long as they had at least a tacit understanding of its criminal purpose.

2. Mental Element

The act of entering into an agreement to commit the crime of genocide must be committed with the requisite mental element. The case law from the *ad hoc* tribunals indicates that the *mens rea* for conspiracy to commit genocide is the same as it is for genocide itself.[56] The *mens rea* for genocide is, of course, a vexed issue in international law.[57] In truth, there are two mental elements.[58] First, there must be a coincidence of the perpetrator's mental state with his acts of genocide, whichever of the enumerated acts those might be.[59] This does not distinguish genocide from other international crimes; the perpetrator must intend to act and be aware of all of the relevant circumstances.[60] Second, and additionally, the perpetrator must act 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such…' This is the so-called special intent of genocide. On this basis, when the *ad hoc* tribunals hold that the *mens rea* for conspiracy to commit genocide is the same as the *mens rea* for genocide, it means that the participants must intend to enter in the agreement with knowledge of the underlying circumstances *and* intend to destroy, in whole or in part, the protected group, as such.

The enumeration of four groups and inclusion of the qualifier 'as such' in the Genocide Convention have led to difficult questions of interpretation, including as to the groups' relationship with social scientific constructions of race and ethnicity, whether it is the subjective identification of the group in the mind of the perpetrator that matters, and whether the group may be defined negatively.[61] These difficulties do not overly trouble us in the South African case. Testimony at the TRC makes clear that the participants in the conspiracy were targeting a racial group – black South Africans – and that membership of the race was the basis on which the measures would have been imposed on any one individual.[62] The targeted racial group was positively identified.[63] In addition, the construction of the group in the minds of the participants matched the reality of racial classification in the 'particular political, social and cultural context'[64] — apartheid South Africa.

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[56] *Nahimana*, Appeals Chamber, *supra* note 42, § 894; *Tolimir*, *supra* note 41, § 586.
[57] See e.g. A. Greenawalt, 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' 99 *Columbia Law Review* (1999) 2259; O. Triffterer, 'Genocide, its Particular Intent to Destroy in Whole or in Part the Group as Such' 14 *Leiden Journal of International Law* (2001) 399; K. Ambos, 'What Does "Intent to Destroy" in Genocide Mean?' 91 *International Review of the Red Cross* (2009) 833.
[58] Ambos, *supra* note 57, at 834. See Judgment, *Krstić*, *supra* note 24, § 20.
[59] Triffterer, *supra* note 57, at 399-400.
[60] See Art. 30 ICCSt.
[61] See W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: CUP, 2000), at 102-150; A. Szpak, 'National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals' 23 *European Journal of International Law* (2012) 155. On the significance of 'as such', see Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, § 16-28.
[62] Testimony of Schalk van Rensburg, *supra* note 6; Testimony of Daan Goosen, *supra* note 12; Testimony of Jan Lourens, Chemical and Biological Weapons Hearings of the Truth and Reconciliation Commission of South Africa (8 June 1998). For a discussion of the difficulties of the race under the Genocide Convention, see Schabas, *supra* note 61, at 120-123.
[63] See *Stakić, supra* note 61, § 20-28.
[64] Judgment, *Rutaganda* (ICTR-96-3-T), Trial Chamber, 6 December 1999, § 56.

It is also required that the intention be directed to destroy the group 'in whole or in part…'[65] Few difficulties arise where the intention is to destroy the group as a whole. An intention to destroy the group 'in part' turns on the number and/or prominence of the targeted individuals — the part targeted must be substantial.[66] So in *Krstić*, the accused was not said to have intended the destruction of Bosnian Muslims as a whole, but rather the Bosnian Muslim population of Srebrenica. This was sufficient to fulfil the requirement of specific intent for genocide.[67]

That the intent to destroy a part of the protected group is sufficient is important for the potential responsibility of participants in Project Coast's anti-fertility research. Although testimony at the TRC does not indicate where the measures were to be imposed, there can be little doubt that they were to target a substantial part of the group. To have a significant effect on the birth rate, as was the underlying rationale, the vaccination would have to have been imposed on many, many people. On this basis, an intention to destroy the protected group at least in part can certainly be inferred.

D. Conclusion on Responsibility

Drawing together the elements, there is at least a reasonable basis to believe that Project Coast's anti-fertility research entailed a conspiracy to commit genocide under international law. The existence of an agreement to commit the crime may be inferred from the concerted effort to develop a fertility vaccine. That vaccine was to be imposed on the targeted group, as contemplated under Article 2(d) of the Genocide Convention, with the specific intention of destroying a substantial part of it. Those who, sharing that specific intention, intentionally participated in the research or authorized or funded its continued existence bear international criminal responsibility for the crime of conspiracy to commit genocide.

5. Jurisdiction and Prosecution

There have been no prosecutions, in South Africa or elsewhere, stemming from Project Coast's anti-fertility research. Moreover, of the central participants, only Jan Lourens received amnesty from the TRC and, in any case, that amnesty did not cover his work on the fertility project. For this reason, we need not engage with the difficult issue of the relationship between domestic amnesties and international crimes.[68]

To unpick the jurisdictional implications of the conspiracy and potential avenues for prosecution, it is relevant that both the perpetrators and proposed victims were South African nationals. Moreover, although a number of the crimes in which scientists at Project Coast participated had cross-border elements, this is not true of the case under consideration. The conspiracy, and its

[65] Art. 2 Genocide Convention.
[66] *Krstić*, *supra* note 24, at § 8; *Popović*, *supra* note 41, § 831.
[67] See *Krstić*, *supra* note 24, at §§ 8-38.
[68] See generally, J. Dugard, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' 12 *Leiden Journal of International Law* (1999) 1001; A. O'Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer, 2002); L. Mallinder, 'Can Amnesties and International Justice Be Reconciled?' 1 *International Journal of Transitional Justice* (2007) 208; F. Lessa and L. Payne (eds), *Amnesty in an Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: CUP, 2012).

effectuating acts, were consummated and carried out on South African territory. The natural forum state is South Africa.[69]

What a prosecution of conspiracy to commit genocide might look like in South African courts today is somewhat complicated. Owing to the exclusion of conspiracy to commit genocide from the Rome Statute, South Africa's implementing statute also does not include the crime of conspiracy in the set of crimes explicitly domesticated.[70] However, Section 232 of the South African Constitution provides that '[c]ustomary international law is law in the republic unless it is inconsistent with the Constitution or an Act of Parliament.'[71] On this basis, it is clear that at least from the entry into force of the Constitution, the customary crime of conspiracy to commit genocide has been a crime in South Africa.[72]

This conclusion was arguably true even prior to the entry into force of the Constitution. Dugard explains that Section 232 simply gave constitutional entrenchment to the prior position in South Africa.[73] South African common law historically took a monist approach to customary international law.[74] On this basis, barring a conflict with legislation, customary international law, including customary international criminal law, was directly applicable in South African courts without domestication.[75] As it does today, the customary crime of conspiracy to commit genocide existed in South African law at the time of the offence.

The direct application of customary international crimes in domestic legal systems is not uncontroversial.[76] As a general principle, in the absence of a prohibitive rule states are free to rely directly on international criminal law in their exercise of domestic jurisdiction.[77] However,

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[69] As to other states, Article 6 of the Genocide Convention imposes an obligation on state parties to prosecute violations of the Convention, an obligation found to be limited to territorial crimes by the ICJ – see *Bosnia v. Serbia*, *supra* note 37, at § 442. However, there is a strong case that the principle of universal jurisdiction extends to conspiracy to commit genocide. On this basis, it would be *permissible* for a foreign state to institute a prosecution, subject to domestic specificities and the principle of comity. See generally, V. Thalmann, 'National Criminal Jurisdiction over Genocide' in Gaeta, *supra* note 39, at 231-258; M. Milanović, 'Territorial Application of the Convention and State Succession' in Gaeta, *supra* note 39, at 473-494.

[70] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (South Africa). It should be noted that South Africa has passed no specific legislation implementing the Genocide Convention.

[71] Section 232 Constitution of the Republic of South Africa, 1996.

[72] See the holding of the Constitutional Court in respect of torture in the *Zimbabwe Torture* case, *supra* note 29, § 37: 'Torture, whether on the scale of crimes against humanity or not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.' The reasoning of the Constitutional Court is applicable to the customary prohibition on genocide and its related acts.

[73] J. Dugard, 'International Law and the South African Constitution' 1 *European Journal of International Law* (1997) 77, at 79

[74] *Ibid*.

[75] See *Nduli and Another v. Minister of Justice and Others* (Appellate Division of South Africa) [1978] (1) SA 893 (A) (24 November 1977); *Inter-Science Research and Development Services (Pty) Ltd v. Republica Popular de Mocambique* (Transvaal Provincial Division) [1980] (2) SA 111 (T) (18 December 1979). It may be noted that these cases did not concern customary international *criminal* law. Nonetheless, other than the legality issue discussed below, there is no reason to distinguish as to incorporation among different kinds of customary international law.

[76] For an overview, including a discussion of prosecutions based on the direct application of international criminal law, see W. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser, 2006).

[77] *S.S. "Lotus", France v. Turkey*, 1927 PCIJ Series A, No. 10.

some scholars contend that the use of customary international criminal law to inculpate defendants in domestic criminal proceedings conflicts with the principle of legality.[78] Highlighting the difficulties inherent in establishing whether a customary rule exists, Fletcher and Ohlin argue that:

> 'Customary law' is anathema in the criminal courts of every civilized society. The reason for legislation is to drive custom from the system and to create a regime based on rules and standards declared publicly, in advance, by a competent authority.[79]

There is something to this argument, at least at the level of principle – democratic ideals and fairness concerns probably do favour a *lex scripta* requirement as part of the principle of legality in domestic prosecutions.[80] In positive law, however, it is necessary to distinguish international and national approaches to the principle of legality.[81] As a matter of international law, the principle of legality does not bar the prosecution of customary crimes — international law does not require written law to satisfy legality.[82] As a matter of national law, the permissibility of the direct application of customary law will depend on the state's particular constitutional considerations together with any broader domestic legality requirements.[83]

What these legality considerations would mean in the South African context has not been authoritatively resolved and, perhaps, cannot be resolved in the abstract — that is, without reference to a particular customary crime. However, there are good reasons to think that a conspiracy prosecution would be permissible. As to the constitutional architecture, neither the pre-constitutional nor post-constitutional doctrine of incorporation makes a distinction among different kinds of customary international law.[84] Thus in the *Zimbabwe Torture* case, the Constitutional Court held that torture was directly applicable as a crime in South Africa by virtue of Section 232 of the Constitution.[85] Moreover, the non-retrospectivity guarantee in Section 35 of the Constitution explicitly refers to international crimes, providing that accused persons have the right 'not to be convicted for an act or omission that was not an offence under either national

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[78] G. Fletcher and J. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' 3 *Journal of International Criminal Justice* (2005) 539, at 556-559; G. Kemp, 'Implementing the Crime of Aggression at National Level: A South African Perspective' in K. Ambos and O. Maunganidze, *Power and Prosecution: Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa* (Göttingen: Universitätsverlag Göttingen, 2012) 39, at 49.

[79] Fletcher and Ohlin, *supra* note 78, at 559.

[80] See *R v. Jones and Others* (House of Lords) [2006] UKHL 16.

[81] See Ferdinandusse*, supra* note 76, at 225-270.

[82] Ferdinandusse, *supra* note 76, at 236-9. See Art. 15(2) International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Art. 7(2) (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.

[83] See Ferdinandusse, *supra* note 76, at 266-269. In some jurisdictions, direct application of this kind might raise difficult questions as to the applicable penalty. In the absence of an applicable penalty, it would be appropriate to determine the penalty by reference to both international criminal practice and sentences imposed for relevant domestic crimes. See Ferdinandusse, at 252-259.

[84] See *Nduli*, *supra* note 75; *Inter-Science Research*, *supra* note 75; Section 232 Constitution.

[85] *Zimbabwe Torture*, Constitutional Court, *supra* note 29, § 37.

or international law at the time it was committed or omitted.'[86] What should matter, in particular, is that the crime is sufficiently precise as to enable the accused to guide her conduct.[87]

In this respect, it is important that the customary crime of conspiracy to commit genocide tracks its textual source in the Genocide Convention. Conspiracy, as a legal doctrine, is well-known to South African law.[88] As in international law, it is inchoate and turns on the existence of an agreement between the parties.[89] Moreover, the object of the conspiracy in the present case – the imposition of measures intended to prevent births in a target group – is explicitly enumerated in the Genocide Convention. Even if it is conceded that certain customary crimes entail uncertainty at the margins, this is not the case in respect of the core conduct under consideration.[90] On this basis, the principle of legality is arguably not a bar to prosecution.

This analysis raises a profound question about the potential prosecution of other customary international crimes in South Africa that have not been domesticated by legislation. Most relevant is the crime of aggression. There is little doubt that aggression is a customary crime; for this reason, it is subject to the same process of incorporation set out above.[91] Moreover, whatever ongoing disputes there are about its definition, the core prohibited conduct is certain.[92] What this would mean in a particular case, including questions as to jurisdiction, immunities, and the relationship between state and individual responsibility, is a matter that requires further research.[93]

6. Conclusion

There is a reasonable basis to believe that the anti-fertility research carried out under the auspices of Project Coast constituted a conspiracy to commit genocide. Conspiracy to commit genocide gives rise to individual criminal responsibility under international law and, as a case of direct application, may be prosecuted in South African courts. Whether it should be prosecuted at this point in time is a different question. Given the number of outstanding apartheid-era crimes for which no amnesty was sought, any prosecution would need to be part of a coherent strategy to address past wrongdoing.[94] There are obviously practical difficulties — witnesses age, memories

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[86] Section 35(3)(l) Constitution.

[87] See *Masiya v. Director of Public Prosecutions, Pretoria and Another* (Constitutional Court of South Africa) [2007] ZACC 9 (10 May 2007), § 52.

[88] Conspiracy is criminalized in South Africa by Section 18(2)(a) Riotous Assemblies Act 17 of 1956 (South Africa).

[89] *Libazi v. The State* [2010] ZASCA 91 (1 June 2010), § 18-19.

[90] For a similar argument in respect of aggression, see *Jones*, *supra* note 80, §§ 19, 59.

[91] See Principle VI, International Law Commission, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal,* 1950. For recent recognition, see *Jones*, *supra* note 80, § 19.

[92] See *Jones*, supra note 80, § 19 (finding that 'the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime.')

[93] For thoughts in this direction, see Kemp, *supra* note 78; B. van Schaack, '*Par in Parem Imperium non Habet*: Complementarity and the Crime of Aggression' 10 *Journal of International Criminal Justice* (2012) 133; N. Jurdi, 'The Domestic Prosecution of the Crime of Aggression after the International Criminal Court Review Conference: Possibilities and Alternatives 14 *Melbourne Journal of International Law* (2013) 1.

[94] At present, this is not the case. The National Prosecuting Authority's amended policy on prosecuting apartheid-era crimes, announced on 1 December 2005, was declared unlawful by the High Court in December 2008 – see

become hazy, documents are lost — as well as principled concerns about unreasonable delay in the institution of charges.[95] Nonetheless, Project Coast's anti-fertility research should at the very least be a part of that conversation.

In addition, this case stands as a strong argument for the continued importance of conspiracy to commit genocide as an international crime. Despite its exclusion from the Rome Statute, the customary status of the crime and the potential for domestic prosecutions is to be supported. For genocidal conspiracies founded on restricting births in particular, in many cases at least as much time and effort will go into the preparatory stage as into the execution of the conspiracy. If we are to be liberated from the scourge of genocide, as the preamble to the Genocide Convention demands, those who conspire to commit genocide ought to be prosecuted.

Nkadimeng and Others v. National Director of Public Prosecutions and Others (High Court of South Africa) [2008] ZAGPHC 422 (12 December 2008). Since then, it seems that little progress has been made.

[95] See Section 342A Criminal Procedure Act 57 of 1977 (South Africa).